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<b>Policy Title:</b>	DHS Business Associate Relationships		
<b>Policy Number:</b>	<b>DHS-100-08</b>	<b>Version:</b>	1.0
<b>Approved By:</b>	<b>Betty Oldenkamp, DHS Secretary</b>		
<b>Effective Date:</b>	April 14, 2003		

## **Purpose:**

The HIPAA Privacy rules identify a new category of business relationship, called a “business associate”. The purpose of this policy is to specify when DHS may disclose an individual’s protected health information or PHI to a business associate of DHS, and to specify provisions that must be included in DHS contracts or memorandum of understanding (MOU) with business associates.

*This document contains guidance for developing procedures to implement this policy.*

## **Policy:**

### **1. General**

- a. DHS has many contractual and business relationships, and DHS has policies related to its contracts and business relationships. However, not all contractors or business partners are “business associates” of DHS. This policy only applies to contractors or business partners that come within the definition of a “business associate”.
- b. If a contractor or business partner is a “business associate,” those contracts that define the contractual relationship remain subject to all Federal and State laws and policies governing the contractual relationship. A “business associate” relationship requires additional contract provisions. The additional contract requirements are described in section **2** (below).

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- c. “Business Associate” as defined in 45 CFR 160.103 means:
- i. With respect to DHS, a person/entity who:
    - A. On behalf of DHS, but other than in the capacity of a member of DHS workforce, performs or assists in the performance of:
      - I. A function or activity involving the use or disclosure of individually identifiable health information, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, billing benefit management, practice management, and re-pricing;  
**or**
      - II. Any other function or activity regulated by federal regulations pursuant to 45 CFR Subtitle A, Subchapter C; **or**
    - B. Provides, other than in the capacity of a DHS employee, legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services to or for DHS, or for an organized health care arrangement in which DHS participates, where the provision of the service involves the disclosure of individually identifiable health information from DHS, or from another business associate of DHS, to the person.
  - ii. A covered entity participating in an organized health care arrangement that performs a function or activity as described in **(i)(A)** (above) of this definition or that provides a service as described in **(i)(B)** (above) of this definition to or for such organized health care arrangement, does not, simply through the performance of such function or activity or the provision of such service, become a business associate of other covered entities participating in such organized health care arrangement.
  - iii. A covered entity may be a business associate of another covered entity.

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- d. A business associate relationship is formed only if PHI is to be used, created, or disclosed in the relationship.
- e. The following are **NOT** business associates or business associate relationships:
  - i. DHS workforce, offices/facilities, and programs;
  - ii. Medical providers providing treatment to individuals;
  - iii. Enrollment or eligibility determinations, involving DHS clients/patients, between government agencies;
  - iv. Payment relationships, such as when DHS is paying medical providers, child care providers, managed care organizations, or other entities for services to DHS clients/patients or participants, when the entity is providing its own normal services that are not on behalf of DHS;
  - v. When an individual's PHI is disclosed based solely on an individual's authorization;
  - vi. When an individual's PHI is not being disclosed by DHS or created for DHS; **and**
  - vii. When the only information being disclosed is information that is de-identified in accordance with **DHS Policy DHS-100-07**, "De-identification of Client or Participant Information and Use of Limited Data Sets".
- f. DHS may disclose an individual's PHI to a business associate and may allow a business associate to create or receive an individual's PHI on behalf of DHS, if:
  - i. DHS first enters into a written contract, or other written agreement or arrangement, with the business associate before disclosing an individual's PHI to the business associate, in accordance with the requirements of section **2** (below) of this policy.
  - ii. The written contract or agreement provides satisfactory assurance that the business associate will appropriately safeguard the information.

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## 2. Contract Requirements applicable to Business Associates

- a. A contract between DHS and a business associate must include terms and conditions that:
  - i. Establish the permitted and required uses and disclosures of PHI by the business associate. The contract may not authorize the business associate to further use or disclose PHI obtained from DHS, except that the contract may permit the business associate to:
    - A. Use and disclose PHI for the proper management and administration of the business associate; **and**
    - B. Collect data relating to DHS operations.
  - ii. Provide that the business associate will:
    - A. Not use or further disclose PHI other than as permitted or required by the contract or as required by law;
    - B. Use appropriate safeguards to prevent use or disclosure of the information other than as provided for by the contract;
    - C. Report to DHS any use or disclosure not allowed by the contract of which the business associate becomes aware;
    - D. Ensure that any agents or subcontractors to whom it provides PHI agrees to the same restrictions and conditions that apply to the business associate under the contract;
    - E. Make PHI available to the individual in accordance with **DHS Policy DHS-100-02**, “Client/Patient Privacy Rights”;
    - F. Make PHI available for amendment and incorporate any amendments in accordance with **DHS Policy DHS-100-02**, “Client/Patient Privacy Rights”;
    - G. Make available the information required to provide an accounting of disclosures in accordance with **DHS Policy DHS-100-02**, “Client Privacy Rights”;
    - H. Makes its internal practices, books, and records relating to the use and disclosure of PHI available to DHS and to the United

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States DHHS, Office of Civil Rights, for the purpose of determining DHS compliance with federal requirements; **and**

- I. At termination of the contract, if reasonably feasible, return or destroy all PHI that the business associate still maintains in any form, and keep no copies thereof. If not feasible, the business associate will continue to protect the information.
- iii. Authorize termination of the contract if DHS determines that the business associate has violated a material term of the contract.
- b. If the business associate of DHS is another governmental entity:
  - i. DHS may enter into a MOU, rather than a contract, with the business associate if the MOU contains terms covering all objectives of section **2** (above) of this policy.
  - ii. The written contract, agreement, or MOU does not need to contain specific provisions required under section **2** (above) of this policy if other law or regulations contain requirements applicable to the business associate that accomplish the same objective.
- c. If a business associate is required by law to perform a function or activity on behalf of DHS, or to provide a service to DHS, DHS may disclose PHI to the business associate to the extent necessary to enable compliance with the legal requirement, without a written contract or agreement, if:
  - i. DHS attempts in good faith to obtain satisfactory assurances from the business associate that the business associate will protect the health information to the extent specified in section **2** (above); **and**
  - ii. If such attempt fails, DHS documents the attempt and the reasons that such assurances cannot be obtained.
- d. Other requirements for written contracts or agreements:
  - i. The written contract or agreement between DHS and the business associate may permit the business associate to:
    - A. Use information it receives in its capacity as a business associate to DHS, if necessary:
      - I. For proper management and administration of the business associate; **or**

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- II. To carry out the legal responsibilities of the business associate.
- ii. Disclose information it receives in its capacity as a business associate if:
  - A. The disclosure is required by law; **or**
  - B. The business associate receives assurances from the person to whom the information is disclosed that:
    - I. It will be held or disclosed further only as required by law or for the purposes to which it was disclosed to such person;  
**and**
    - II. The person notifies the business associate of any known instances in which the confidentiality of the information has been breached.

## 3. Responsibilities of DHS in Business Associate relationships

- a. DHS responsibilities in business associate relationships include, but are not limited to, the following:
  - i. Receiving and logging an individual's complaints regarding the uses and disclosures of PHI by the business associate or the business associate relationship;
  - ii. Receiving and logging reports from the business associate of possible violations of the business associate contracts;
  - iii. Implementation of corrective action plans, as needed; **and**
  - iv. Mitigation, if necessary, of known violations up to and including contract termination.
- b. DHS will provide business associates with applicable contract requirements, and may provide consultation to business associates as needed on how to comply with contract requirements regarding PHI.

## 4. Business Associate non-compliance

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- a. If DHS knows of a pattern of activity or practice of a business associate that constitutes a material breach or violation of the business associate's obligation under the contract or other arrangement, DHS must take reasonable steps to cure the breach or end the violation, as applicable, including working with and providing consultation to the business associate.
- b. If such steps are unsuccessful, DHS must:
  - i. Terminate the contract or arrangement, if feasible; **or**
  - ii. If termination is not feasible, report the problem to the United States DHHS, Office of Civil Rights.

## **Guidance for Procedure Development:**

*The following guidelines should be used in developing procedures to implement this policy.*

### **1. Tracking and identifying DHS' Business Associates**

- a. DHS staff will identify those business relationships that are also Business Associates.

**Examples of DHS Business Associate relationships:** Contracted psychiatrist providing services to clients at the SD Developmental Center; computer consultants, i.e. Dakota State University; Alcohol/Drug and Mental Health Centers in their capacity of determining eligibility for DHS clients; Guardian Representatives acting on behalf of the Department Secretary; or, Adjustment Training Centers acting as fiscal agents for DHS in regards to Family Support Services.

- b. DHS staff will notify the Office of Budget and Finance of those business relationships identified as "business associates" along with the function(s) identified that the person/entity is providing on DHS' behalf.
- c. Office of Budget and Finance will develop a Business Associate Agreement or MOU or amend an existing contract or MOU with the contract requirements as outlined in section **2** (above) of this policy.
  - i. Upon completion of the contract or amendment process, the appropriate Office of Budget and Finance staff will log the contract/MOU into the contract database and follow the routing procedures for all contracts.

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## 2. Business Associate contracts initiated by outside entities

- a. DHS staff receiving a business associate contract for signature from an outside entity shall:
  - i. Work with the DHS HIPAA Privacy Contact for that division/facility to determine what activity or activities that DHS is performing on behalf of the entity; **and**
  - ii. Alert the Office of Budget and Finance that a Business Associate contract is being routed in which it has been determined that DHS is performing a function on that entities behalf; **or**
  - iii. Alert the Office of Budget and Finance that it has been determined that DHS is **NOT** performing a function on that entities behalf.
- b. If it is determined by the division/facility that DHS does have a business associate relationship with the outside entity, the business associate agreement shall be routed to the Office of Budget and Finance along with assurances that DHS staff can meet the requirements of the agreement.
- c. If it is determined by the division/facility that DHS does **NOT** have a business associate relationship with the outside entity, the DHS HIPAA Privacy Contact for that division/facility will notify the requesting party in writing that the division/facility will not be entering into the agreement and why.

## 3. DHS' response to complaints about Business Associates inappropriate uses or disclosures

- a. DHS staff who receive a client/patient complaint, or a report or complaint from any source, about inappropriate uses or disclosures of information by business associates, will:
  - i. Provide information regarding that report or complaint to the DHS HIPAA Privacy Contact for their respective division/facility.
  - ii. The DHS HIPAA Privacy Contact will alert the Office of Budget and Finance and also notify the DHS HIPAA Compliance Officer at the Central Office that a complaint has been received.
  - iii. The Office of Budget and Finance will document such information in the business associate's contract record in the contract database.



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- b. The DHS HIPAA Privacy Contact, in consultation with the Office of Budget and Finance, will send a letter to the business associate, requesting that the business associate review the circumstances related to the alleged pattern or practice. DHS will require that the business associate respond, in writing, within 10 business days to the complaint.
- c. If determined necessary and appropriate, DHS Office of Budget and Finance will generate a “cure letter” outlining required remediation in order for the business associate to attain contract compliance.
- d. In cases where contract compliance cannot be attained, DHS must terminate the contract, if feasible. If termination is not feasible, the DHS HIPAA Privacy Official will report the problem to the United States DHHS, Office of Civil Rights.

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## **Reference(s):**

- 45 CFR 160 & 164

## **Contact(s):**

- For Central Office Staff and Field Office Staff - DHS HIPAA Privacy Office, (605) 773-5990
- For Human Services Center Staff – DHS HIPAA Privacy Contact, (605) 668-3100
- For South Dakota Developmental Center Staff – DHS HIPAA Privacy Contact, (605) 472-2400